STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: Cooper, P.J., and Fort Hood and Borrello, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RANDY R. SMITH,

Defendant-Appellee.
_____/

Supreme Court No. 130245

Court of Appeals No. 256066

Lower Court No. 03-193910-FC

OAKLAND COUNTY PROSECUTING ATTORNEY
Attorney for Plaintiff-Appellant

ROBIN M. LERG (P 40297)
Attorney for Defendant-Appellee

130245
DFNE's Supplement

DEFENDANT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

ROBIN M. LERG (P 40297)
Attorney for Defendant-Appellee
3001 W. Big Beaver, Ste. 324
Troy, MI 48084
(248) 649-4777

TABLE OF CONTENTS

INDEX OF AUTHORITIES CITED.....ii

STATEMENT OF QUESTIONS PRESENTED.....iv

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS.....1

ARGUMENT.....13

1. Defendant-Appellee is entitled to a jury instruction on the lesser offense of "statutory" manslaughter under MCL 750.329, because it is a degree of the law of criminal homicide that is inferior to the charged offense under MCL 768.32(1) and the trial evidence would permit a rational jury to find that only the lesser and not the charged offense was committed.....13

Standard of Review & Issue Preservation.....13
Discussion.....13

A. "Statutory" involuntary manslaughter under MCL 750.329 is a necessarily included lesser offense of murder.....13

B. A rational view of the evidence in this case supported a conviction of "statutory" manslaughter.....22

C. The Oakland Circuit Court's failure to instruct the jury on "statutory" involuntary manslaughter was not harmless error.....23

SUMMARY AND RELIEF.....25

INDEX OF AUTHORITIES

Cases

Beck v Alabama, 447 US 625; 100 S Ct 2382; 65 L Ed 2d 392 (1980) 23
Bennett v Scroggy, 793 F2d 772 (CA 6, 1986) 23
Ferrazza v Mintzes, 735 F2d 967 (CA 6, 1984) 23
Hanna v The People, 19 Mich 316 (1869) 14, 15, 20
Hopper v Evans, 456 US 605; 102 S Ct 2049; 72 L Ed 2d 367 (1982) 23
Maher v People, 10 Mich 212, 219 (1862) 18
People v Andrus, 331 Mich 535, 547-547; 50 NW2d 310 (1951) 20
People v Carter, 387 Mich 397, 418; 197 NW2d 57 (1972) 18
People v Chamblis, 395 Mich 408; 236 NW2d 473 (1975) 15
People v Cornell, 466 Mich 335; 646 NW2d 127 (2002) 13, 14, 15
People v Datema, 448 Mich 585, 593; 533 NW2d 272, 276 (1995) 17, 18
People v Droste, 160 Mich 66, 78-79; 125 NW 87 (1910) 20
People v Duggan, 115 Mich App 269, 272; 320 NW2d 241 (1982) 19
People v Goecke, 457 Mich 442, 463-464; 579 NW2d 868 (1998) 17
People v Heflin, 434 Mich 482, 497; 456 NW2d 10 (1990) 16, 19
People v Jones, 395 Mich 379; 236 NW2d 461 (1975) 15
People v Maghzal, 170 Mich App 340, 345; 427 NW2d 552 (1988) 16, 19
People v McMurchy, 249 Mich 147, 162; 228 NW 723 (1930) 17
People v Mendoza, 468 Mich 527; 664 NW2d 685 (2003) ..... passim
People v Palmer, 105 Mich 568, 576; 63 NW 656 (1895) 17
People v Pouncey, 437 Mich 382; 471 NW2d 346 (1991) 16, 18
People v Ross, 73 Mich App 588 (1977) 23
People v Ryczek, 224 Mich 106, 110; 194 NW 609 (1923) 18
People v Scott, 6 Mich 287, 292-293 (1859) 16, 18
People v Silver, 466 Mich 386, 388 n2; 646 NW2d 150 (2002) 13, 23
People v Stephens, 416 Mich 252; 330 NW2d 675 (1982) 15
People v Stubenwoll, 62 Mich 329, 331; 28 NW 883 (1886) 17
People v Torres (On Remand), 222 Mich App 411, 419-420; 564 NW2d 149 (1997) 15
People v Townes, 391 Mich 578, 589; 218 NW2d 136 (1974) 18
People v Treichel, 229 Mich 303, 307-308; 200 NW 950 (1924) 20
People v Van Wyck, 402 Mich 266; 262 NW2d 638 (1978) 16
People v. Doss, 78 Mich. App. 541 (1978) 2, 19
Sansone v United States, 380 US 343; 85 S Ct 1004; 13 L Ed 2d 882 (1965) 16

Statutes

MCL 750.316 16
MCL 750.317 ..... 1, 17
MCL 750.321 ..... 1, 23
MCL 750.329 ..... passim
MCL 768.32(1) ..... passim

Other Authorities

CJI 2nd 16.11 9

Rules

FRCP 31(c) 16

Treatises

Perkins & Boyce, Criminal Law (3d ed), p. 83 ..... 17, 18

STATEMENT OF QUESTIONS PRESENTED

1. Is defendant-appellee entitled to a jury instruction on the lesser offense of "statutory" manslaughter under MCL 750.329, because it is a degree of the law of criminal homicide that is inferior to the charged offense under MCL 768.32(1) and the trial evidence would permit a rational jury to find that only the lesser and not the charged offense was committed ?

The trial court said "No."

Court of Appeals said "Yes."

Plaintiff-Appellant says "No."

Defendant-Appellee says "Yes."

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Introduction

Defendant-Appellee Randy R. Smith (defendant) was originally charged in the alternative with one count of second degree murder, MCL 750.317, or manslaughter, MCL 750.321, and felony firearm, MCL 750.227b in the shooting death of Ashleigh Moomaw (*Complaint,* lower court file). Following the preliminary examination, the prosecution was successful in adding a second alternative count of manslaughter committed by aiming or pointing a firearm intentionally but without malice, MCL 750.329 (PE 3-4, 65-67, 69). Following a two-day jury trial before Oakland County Circuit Court Judge Edward Sosnick, defendant was convicted of second degree murder and felony firearm. On May 5, 2004, defendant was sentenced to consecutive terms of 31 to 50 years and two years respectively.

Amended alternative manslaughter charge under MCL 750.329

Before the preliminary examination, the prosecution announced that it was going to move to bind defendant over on an additional, alternative count of manslaughter under the theory of "death by weapon aimed with intent, but without malicious (sic)," (PE 3-4) because:

> Basically, it's another form of manslaughter that's not contained in the statutory short form. And the statute for that, Your Honor, is MCL 750.329 (PE 4).

During the preliminary examination, the prosecution specifically elicited from Jamie Crawford that defendant intentionally aimed the gun in the decedent's direction, then successfully moved to add the second alternative count of involuntary manslaughter under MCL 750.329, acknowledging that "it's a question of fact truly as to what the

defendant's state of mind is and was at the time of the incident. That's the real question here." (PE 51, 65-67).

On March 31, 2004, the prosecution filed a motion "For Leave of Court to Dismiss Alternative Charge," because "it is inapplicable to the facts of the case and inconsistent with the prosecution's theory of what occurred:"

> 'The statute was designed to punish the careless use of firearms when no mischief was designed. The absence of malice is as necessary an ingredient in the statutory definition as is the use of firearms.' *People v. Doss,* 78 Mich. App. 541 (1978). It is the People's position however, that the Defendant killed Ashleigh Moomaw with malice, or at the very least acted mischievously. As such, MCL 750.329 is inapplicable to the present the case (sic). (26e).

At the March 31, 2004 motion hearing, defendant asked the court to consider expanding *People v Mendoza,* 468 Mich 527; 664 NW2d 685 (2003) "to indicate that once the Prosecution has charged a count of that nature,[1] that because it could be given as a jury instruction, if I can show the facts, that it should at least remain there through the presentation of the facts of the case." (3-31-04 3-4). After the trial court granted the motion to dismiss the alternative count under MCL 750.329, this exchange occurred:

> ...what opened is obviously after the proofs are submitted, whether or not that will be given as necessarily included offense (sic) if the facts so support it.
>
> MR. WIGOD [prosecutor]: I agree.
>
> THE COURT: Yeah. So –
>
> MR. WIGOD: If the Court determines that it –
>
> THE COURT: It would never go to the jury – it's an alternative – the only purpose of that charge, originally, was because of the case, you know, to protect the People. Okay. So the bottom line is, I grant the motion to dismiss. *At the close of the proofs, we talk about, you know, what will be offered as lesser included, I'll reconsider it at that time, or I will seriously consider it at that time.*
>
> MR. WIGOD: *Okay* (3-31-04 4-5, emphasis added).

[1] The defense argued, and the trial court agreed, that the offense was a necessarily included offense under *Mendoza* (3-31-04 3).

Trial Evidence

The charges stemmed from the shooting death of Moomaw on December 7, 2003. Relying on the discussion between the trial court and the prosecutor following the dismissal of the alternative count of manslaughter under MCL 750.329 on March 31, 2004, the defense told the jury in its opening statement that its theory was that defendant was guilty of the dismissed alternative charge:

> ...Let me be real clear about one thing. Randy Smith is guilty. He's *guilty of having that weapon in his hand.* He's *guilty of having that weapon fire from his hand and the result of that was that Ashley (sic) Moomaw died.* I am not going to stand here and try and say to you not guilty, let's forget all those facts. That would be – on may part because the facts show that he killed her (sic). *I'm only asking that you look at the law and you look at what the law has given you as options. And that the option you select is one that fits the facts, not the highest possible charge. You will be getting an instruction from the law that is manslaughter, intentionally aiming a weapon without malice and without the specific intent to kill. That you will see and we will argue more in closing argument and you'll see from the facts how that charge plays into what prosecution has to prove on second degree and first degree. – second degree and manslaughter* (sic). But you see, there is one critical difference. And in second degree, as the prosecution has read you, for him to prove his case beyond a reasonable doubt, tht he has to show the Defendant had one of these three stages of mind: he intended to kill, he intended to do great bodily harm, or he knowingly created a very high risk of death or great bodily harm knowing that the death or great bodily harm would be the likely result of his actions. Involuntary manslaughter charge is a little bit different. It has all the same elements as we talked about the two. At the end of the trial, you will be able to have a set so you can read them because listening to us talk about them is very different before all the evidence you're going to be hearing on all the information, but the key difference here is that the Defendant intended to point the firearm – in the manslaughter charge – without lawful excuse or justification. The charge itself reads without malice. Malice being desire to inflict injury or harm or suffering on another because of hostile – deep seated meanness.
>
> There is on denial (sic) that the death occurred – gun was in his hand and he fired. *And that's the single point difference between the prosecution is going to interpret those facts and how I'll be interpreting those facts and presenting proof* – (someone coughing) *Randy Smith* (4-12-04 17-18, emphasis added).

...

> ...When we finish the trial, when we come back after closing statements, I'm going to ask you now, as *I'm going to ask you then, find him not guilty of second degree murder – guilty of intentionally aiming that weapon without that malice,* the guilt make him for that but do it for the correct charge (4-12-04 22-23, emphasis added).

Testimony elicited showed that police found a locked door and covered windows when they arrived at 135 W. Madge in Hazel Park, and after forcing their way in, found a woman lying motionless on her left side in a fetal position on the living room floor in a pool of blood with a possible bullet wound over her right eye (4-12-04 33-41). Emergency medical services workers pronounced her dead at the house (4-12-04 54). It was later determined that she died of a gunshot wound that would not have caused instantaneous death from a small caliber bullet that had not been fired a close range as the result of a homicide (4-13-04 11-18). Toxicology tests showed that she had consumed a small amount of alcohol (4-13-04 15).

When Darrin Teed went to defendant's house to purchase ecstasy from "Blain Bravin"[2] at about 1:00 a.m. on December 7, 2003, "Bravin" opened a kitchen drawer, pulled out a gun Teed later identified as a Browning .22 long rifle, and showed it to him. Moomaw and Crawford arrived at the house around the same time. While calls were being made to get the ecstacy, defendant, sitting in the middle of the living room couch, pulled a gun, identified as a .25 caliber semiautomatic, out of his waistband, showed it to Teed, and told him that the gun held six rounds in the clip and one in the chamber. Defendant took out the magazine and showed it to Teed. Teed did not see the gun again after defendant re-loaded the magazine. Jeremy Johnson, who had been trying to secure the ecstacy, announced that he could get some ecstasy pills at a party "on

[2] It is believed that Teed was referring to Blaine Braybant.

Caldonia," so Teed, "Bravin" and Johnson borrowed Moomaw's car and went to get it, while defendant, Moomaw and Crawford remained behind (4-12-04 109-119, 121).

Crawford testified that the original plan had been to "hang out" with "Britney Crawford (Britney)" and "Jennifer Edgle (Edgle)." When she got off of work at around 10:00 p.m., Moomaw picked Crawford up and headed to defendant's house so that Moomaw could retrieve her shoes. They noticed that a car belonging to Christina Lauria, a girl neither one of them got along with, was parked across the street, so Moomaw decided that she did not want to retrieve her shoes. Crawford volunteered, but when she heard defendant's voice respond to her knock on the door, Crawford returned to Moomaw's car, as they had not expected him to be there (4-12-04 130-136).

Moomaw drove to a gas station, to call "Britney" and Edgle to finalize their plans, then drove to her house. Moomaw tried to call defendant, but instead, got a "call back" from "Megan Boutache," "another girl she had a problem with." When defendant called Moomaw to invite her over to his house, she was "all for it." Crawford was not crazy about the idea, but they went anyway and told "Britney" and Edgle that they would call from defendant's house when they were ready to "meet up." (4-12-04 136-139).

Moomaw and Crawford brought liquor with them and arrived to find defendant, Johnson, "Blaine"[3] and someone Crawford did not know[4] present. Almost immediately, Moomaw allowed Johnson and the unknown person to borrow her car. "Blaine" talked to Moomaw for "less than a minute" and also left. Moomaw went into the kitchen, took a sip of vodka, drank Cherry Coke® and "messed" with defendant's pit bull puppies. Defendant put the dogs "somewhere" and he and Moomaw went into the living room

[3] It is believed that Crawford was referring to Blaine Braybant.
[4] It is believed that Crawford was referring to Teed.

couch to talk. From her vantage point near the kitchen sink, Crawford heard defendant say "say I won't, say I won't do it," and looked over to see "like a side view of a gun" that was pointed in Moomaw's direction, such that if it had gone off, it would not have hit Moomaw. Crawford heard Moomaw say "you're stupid, don't do it, you're gay." Defendant said "yeah, you're right," but started in again with saying "say I won't." As Crawford walked towards the living room, she saw the gun pointed at Moomaw's head and heard defendant say "say I won't," and Moomaw say "no, you wouldn't, don't be stupid." Crawford "glanced" down, heard a gun fire, heard something fall and looked to see defendant stand up and Moomaw motionless on the floor. Crawford initially thought Moomaw had fainted, because she saw nothing indicating that she had been shot. Crawford went to the laundry room, telling herself that it was all a dream and that she would wake up. When she returned to the living room a few seconds later, Crawford saw blood under Moomaw's head. Defendant followed Crawford when she returned to the laundry room for a second time, told her "promise you're not going to say anything, swear to God you're not going to tell anybody," and instructed her to say that Moomaw shot herself. Crawford agreed to not say anything (4-12-04 140-164).

Defendant told Crawford that they had to leave. Defendant appeared to be wiping his hands with a towel when he returned from the bedroom. Crawford did not see a gun. Crawford asked defendant if she could use his cellular phone, but defendant said that "Blaine" had it. When they got on the front porch, defendant returned to retrieve some marijuana. The pair "hopped two fences" together but Crawford eventually split from defendant, and got a ride to a friend's house and called her mother

and police (4-12-04 164-174). Defendant was apprehended in Hamtramck at 10:00 a.m. on December 7, 2003 (4-13-04 39-42).

During cross-examination, Crawford acknowledged telling police that this was not the first time Moomaw had told her that defendant pointed a gun at her and that she honestly did not think defendant would hurt Moomaw. She also told jurors that defendant was careless about the gun. Through instant messaging, she told Michelle Gomez that defendant did not do it on purpose and that it sounded like he was joking (4-12-04 183-199).

Police examined and tested a .25 caliber semi-automatic Raven, model MP25 handgun. It appeared to have no major damage other than from general use. It had a manual safety that indicated "safety" when the gun was in a safe mode and also had an internal safety that prevented the gun from firing if a bullet lodged itself halfway into the chamber. The gun did not fire when purposely dropped on the ground or when tapped on the rear slide with a rubber mallet and only fired when the trigger was pulled, and only with six to seven pounds of pressure. During cross-examination, the gun examiner admitted that waiving a gun without the safety engaged was not prudent (4-12-04 217-222, 239).

Police also analyzed one spent cartridge and one bullet recovered from Moomaw's body, determined that the bullet had been fired by the .25 caliber semi-automatic Raven, but could not determine with 100 percent certainty that the spent cartridge had been fired from the .25 caliber semi-automatic Raven (4-12-04 230-236).

Lauria testified that on Friday, December 6, 2003, she traveled to Bad Axe with defendant, "Megan" and "Blaine," spent the night and returned the next day. She went

to defendant's house later in the day, but when she learned that Gomez and "Angel Trout" were there, she left and purchased alcohol with "Megan." They returned after Gomez and "Angel Trout" left to consume three shots of alcohol and smoke marijuana, while defendant drank a "couple" of beers and smoked some marijuana. Defendant took a weapon into the bedroom and put it under the mattress when he and Lauria went there to kiss. On a couple of occasions in the past, defendant had pulled out his gun, looked at her and said "say I won't," but she did not see the action as threatening took it as a joke because "he wouldn't do anything like that." (4-12-04 244-253, 255).

A search of the house turned up a plastic bag containing a green, leafy substance police suspected was marijuana on a coffee table (4-12-04 58). A spent .25 caliber shell casing was found between the cushions of the couch (4-12-04 59-61). Ten .22 caliber live rounds were found in an "entertainment center." (4-12-04 62-63). A gold box containing 16 .25 caliber live rounds were found in a bedroom closet (4-12-04 65-68). A black gun case was found under the bed (4-12-04 69). Six .22 caliber live rounds were found in a drawer in the kitchen (4-12-04 71-72). A .22 short shell casing was found in the garbage in the laundry room (4-12-04 73). On the back deck, two large bags of suspected marijuana were found under the lid of the barbeque grill (4-12-04 75). In an area between a chain link fence and a privacy fence, an unloaded Browning .22 long rifle missing its magazine was found (4-12-04 75-79). Later, police found a.25 caliber semi-automatic pistol with a disengaged safety loaded with five live rounds, $110 in cash and a paper towel in a neighbor's back yard (4-12-04 80-92, 98).

Nathan Pellow claimed he had a confrontation with defendant on November 2, 2003 when he went to a house in Madison Heights to pick up his sister from a party.

Pellow claimed he "kind of" grabbed defendant by his coat and threatened to "beat the crap out of him," and defendant responded by "screaming" "oh, you want to fuck with me motherfucker," and firing three gunshots – the first one into the air, the second one "came down a little bit," and third one in some unknown direction before "taking off." Despite this, Pellow did not report this incident to police (4-13-04 21-29).

Before closing arguments, defendant asked the trial court to instruct the jury on manslaughter by intentionally aiming a weapon without malice as a lesser-included offense under the authority of *People v Mendoza*:

> Your Honor, I understand that based on the case law that I've provided, People v Mendoza, that I had asked specifically for the lesser offense, manslaughter of intentionally aiming a weapon without malice, that I would still waive under the terms and conditions of – that I would be entitled to that instruction (4-13-04 63-64).

The trial court refused to do so:

> You know the Court has carefully looked at the proposed instruction, which is CJI 2nd 16.11, in light of recent case law. And even under Gomez, it appears as if the instruction is based upon an element, namely intentionally pointing a firearm, which is not part of the elements necessary for second degree murder. And accordingly, that – I would agree with the Prosecutor. That does appear to be a cognate offense and under the recent opinion of – I always forget the name.
>
> MR. CATALDO: Mendoza.
>
> THE COURT: No, no, no.
>
> MR. WIGOD: Cornel (phonetic).
>
> THE COURT: Cornel. Under Cornel, whether we agree with Cornel or not, that is the law and I am bound to follow it. So, I will not be able to give that instruction (4-13-04 63-64).

Faced with this ruling, the defense was forced to tell jurors in its closing statement:

> ...And there were some things that I said in opening statement that I had hoped to show. But as I said in opening statement, trials are living, breathing things and circumstances change and there were a couple of things, unfortunately, that I said that I wasn't able to show. But at the

same time, I think that you can get a sense of what this case was all about. A sense of the context of this case (4-13-04 83-84).

Faced with the trial court's ruling, the defense could only argue that defendant was careless with the gun, to comport with the involuntary manslaughter instruction the trial court indicated it would give:

> ...Jamie has said on numerous occasions, as she told you, she doesn't know whether it was on purpose or whether it was intentional. She told her mother she didn't think it was on purpose. She wrote it in her own handwritten statement on that night. She thought it was careless use of a weapon, that in fact Randy had been careless with the weapon. She writes to her friend Michelle Gomez, I know Randy didn't do it on purpose. I don't think he did it on purpose (4-13-04 87).
>
> ...
>
> ...you know, he needs to be held accountable and there are degrees of accountability. He shouldn't be held accountable as a murderer. He should be held accountable as a manslaughter (sic). That's really what this was. Manslaughter has – You will receive a set of these instructions. I really, really ask that, as the Judge will express to you and how to begin your deliberations and what to do, that you take the time to read the critical elements. Because when I said at the beginning of this case is what I'm going to say now, it's a – issue case. It's not a simple case. It comes to how you define these facts to this – nothing more, nothing less. That's why I believe you get it. It's not an issue of sympathy. It's an issue of what those facts me, collectively to you. You may also put in a lesser charge of involuntary manslaughter. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt. First, the Defendant cause (sic) the death of Ashley (sic) Moomaw – Ashley (sic) Moomaw died as a result of a gunshot wound to the head. We don't deny that. The Prosecution's got that – Second, in doing that act, the Defendant acted in a grossly negligent manner. So, the Prosecutor is all over – and all over the instruction of whether it's or, or, or and saying, well, if you don't believe it was intent, then you can believe this. If you don't believe it was this, then it's that. We need to throw this into the mix, okay. The definition of gross negligence. Gross negligence means that more than carelessness (sic). It's mean willfully disregarded the results to others that might follow from an act or failure to act (sic). In order to find that the Defendant was grossly negligent, you must find each of the following three things beyond a reasonable doubt. First, that the Defendant knew of a danger to another. That is he knew there was a situation that required him to take ordinary care to avoid injuring another. Second, that the Defendant could have avoided injuring another by using ordinary care. I guess that would be turning that safety on. Third, that the

> Defendant failed to use ordinary care to prevent injuring another when to reasonable (sic) person it would have been apparent that the result was likely to be serious injury (sic) (4-13-04 91-92).
>
> ...
>
> ...Mr. Smith is responsible for the death of Ashley (sic) Moomaw and I would ask you to – I'm asking you to find him guit (sic) of what the law said his behavior was on that day. And that's guilty of possession of a weapon, which was used, and guilty of a lesser charge (4-13-04 93).

The jury found defendant guilty of the two charged offenses (4-13-04 107-108).

Appellate Proceedings

On June 15, 2004, defendant claimed an appeal from his convictions and sentences. Among the five issues of error he argued in the brief he filed in the Court of Appeals on November 23, 2004 was that he was denied a fair trial and a properly instructed jury because the trial court did not instruct on the necessarily included involuntary manslaughter offense. On December 22, 2004, the Court of Appeals (Cooper, P.J., and Fort Hood and Borrello, JJ.) unanimously reversed defendant's convictions on the instructional issue in an unpublished opinion, noting that the prosecution had initially charged defendant with violating MCL 750.329 as an additional lesser offense to murder, but dismissed it before trial, and while the prosecution had broad discretion to choose what charges to bring, the trial court was nonetheless required to instruct the jury regarding the dismissed charge on defendant's request because it was supported by a rational view of the evidence.

> The statute [MCL 750.329] provides that a particular act—intentionally aiming a firearm—that results in an unintentional death falls within the general category of involuntary manslaughter. Defendant committed that particular act in this case. Although defendant's state of mind was in dispute, Ms. Moomaw was killed when defendant intentionally aimed a firearm at her head. Had the requested instruction been given, the jury could have determined from the evidence that defenant (sic) intentionally aimed the firearm without intending to harm Ms. Moomaw.

In reaching its result in the case at bar, the Court of Appeals considered and rejected the arguments made by the prosecution:

> On remand, the prosecutor has the authority to charge the defendant with any applicable lesser offense. Yet, that authority to charge defendant does not limit the defendant's right to request, and the trial court's duty to give, an instruction regarding necessarily included lesser offenses supported by a rational view of the evidence. The court must instruct the jury regarding involuntary manslaughter based on a theory of gross negligence should the prosecutor again raise that charge. Consistent with *Mendoza,* however, the trial court must also instruct the jury regarding the more specific, and more appropriate, charge of involuntary manslaughter under MCL 750.329.

On December 28, 2005, the prosecution filed an *Application for Leave to Appeal* and on January 17, 2006, defendant filed a *Brief in Opposition to Application for Leave to Appeal.*[5] On March 31, 2006, this Court issued an order directing the Clerk to schedule oral argument on whether to grant the prosecution's application or take other peremptory action and directed the parties to file supplemental briefs addressing the following: (1) whether statutory involuntary manslaughter, MCL 750.329, is a necessarily included lesser offense of murder, and, if so, (2) whether a rational view of the evidence in this case supported a conviction of statutory involuntary manslaughter; and, if so, (3) whether the Oakland Circuit Court's failure to give a jury instruction on statutory involuntary manslaughter was harmless error. Defendant now files this *Supplemental Brief in Opposition to Application for Leave to Appeal.*

[5] Defendant also filed a *Cross-Application for Leave to Appeal* addressing the balance of the issues raised in his appeal in the Court of Appeals which remains pending in this court.

ARGUMENT

1. DEFENDANT-APPELLEE IS ENTITLED TO A JURY INSTRUCTION ON THE LESSER OFFENSE OF "STATUTORY" MANSLAUGHTER UNDER MCL 750.329, BECAUSE IT IS A DEGREE OF THE LAW OF CRIMINAL HOMICIDE THAT IS INFERIOR TO THE CHARGED OFFENSE UNDER MCL 768.32(1) AND THE TRIAL EVIDENCE WOULD PERMIT A RATIONAL JURY TO FIND THAT ONLY THE LESSER AND NOT THE CHARGED OFFENSE WAS COMMITTED.

Standard of Review & Issue Preservation

An appellate court "review[s] the entire cause" to determine whether there was "substantial evidence" to request a lesser-included offense instruction. *People v Silver*, 466 Mich 386, 388 n2; 646 NW2d 150 (2002). Whether an offense is a necessarily included lesser offense is a question of law reviewed de novo. *People v Mendoza,* 468 Mich 527, 531; 664 NW2d 685 (2003).

Defendant preserved this issue when he asked the trial court to instruct the jury on "statutory" involuntary manslaughter under MCL 750.329 (4-13-04 63-64).

Discussion

A. "STATUTORY" INVOLUNTARY MANSLAUGHTER UNDER MCL 750.329 IS A NECESSARILY INCLUDED LESSER OFFENSE OF MURDER.

MCL 768.32(1) governs the propriety of lesser included offense instructions:

> Except as provided in subsection (2), upon an indictment for an offense, *consisting of different degrees*, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of *a degree of that offense inferior to that charged in the indictment,* or of an attempt to commit that offense" (emphasis added).

People v Cornell, 466 Mich 335; 646 NW2d 127 (2002) noted that this statute was virtually unchanged from the original version enacted in 1846, and determined when a lesser included offense instruction should be given, based in part on the interpretation of

the 1846 statute given in *Hanna v The People,* 19 Mich 316 (1869), quoting at length from Justice Christiancy's opinion. In that decision, which held that the accused was entitled to an assault and battery instruction when charged with assault with intent to kill, Justice Christiancy concluded that the 1846 statute did not limit the right to instructions on lesser offenses to only those situations where the Legislature expressly divided or designated an offense into "degrees:"

> Thus confined, it would apply, so far as I have been able to discover, only to the single case of an indictment for murder in the first degree, *and would not even include manslaughter as a lower degree of the offense,* but only murder in the second degree; since murder is the only offense divided by the statute into classes expressly designated as 'degrees.' Beside, if thus restricted to the crime of murder, it can apply only to that very class of cases in which it was not needed, either as declaratory of, or as amending the common law; *since, without the provision, the common law by the narrowest application ever adopted, had already fully provided for the case; as no one can doubt that without this provision, the common law rule would, under the statute, dividing murder into degrees, have authorized a conviction not only for murder in the second degree, but for manslaughter also, under an indictment for murder in the first degree, all these offenses being felonies included in the charge. Hanna,* 321-322. (Emphasis added).

He concluded that the 1846 statute applied in all cases where the Legislature "has substantially, or in effect, recognized and provided for the punishment of offenses of different grades, or degrees of enormity, where the charge for the higher grade includes a charge for the less." *Hanna,* 322. Further, Justice Christiancy concluded that the 1846 statute did not exempt offenses designated as misdemeanors from being inferior degrees of a charged offense, because the indictment on the higher charge was notice to the accused of the lesser as well, being an inferior degree of the charged offense.

Cornell reviewed subsequent Michigan decisions on the right to instructions on lesser included offenses, primarily *People v Chamblis*, 395 Mich 408; 236 NW2d 473

(1975); *People v Jones*, 395 Mich 379; 236 NW2d 461 (1975); and *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982), which created different rules for instructions depending on whether the lesser offense was characterized a "necessarily included" offense or a "cognate" offense. After reviewing this history, *Cornell* concluded that these cases ignored the language of MCL 768.32(1), as interpreted in *Hanna*, and overruled this line of authority in favor of Justice Christiancy's statutory interpretation:

> ...Therefore, in our opinion, it is necessary to return to the statute and the construction it was given by the *Hanna* Court and by Justice Coleman in her dissent in *Jones*.
>
> In pertinent part, the statute provides that the jury 'may find the accused person guilty of a degree of that offense inferior to that charged in the indictment.' MCL 768.32(1). As the *Hanna* Court explained, the provision was not intended to be limited only to those expressly divided into 'degrees,' but was intended to extend to all cases in which different grades of offenses or degrees of enormity had been recognized. Moreover the statute removed the common-law misdemeanor restriction. Thus, application of the statute is neither limited to those crimes expressly divided into degrees nor to lesser included felonies. *Cornell*, 353-354.

In *Jones*, Justice Coleman wrote in dissent that a party should only be entitled to an instruction on a "necessarily included" offense. *Cornell* cited with approval *People v Torres (On Remand)*, 222 Mich App 411, 419-420; 564 NW2d 149 (1997), where it was held that the term "inferior," as used in the statute,

> ...does not refer to inferiority in the penalty associated with the offense, but, rather, to the absence of an element that distinguishes the charged offense from the lesser offense. The controlling factor is whether the lesser offense can be proved by the same facts that are used to establish the charged offense. *Cornell*, 354.

Cornell held that if an offense met this test, the instruction was warranted only if the trial record showed that the requesting party disputed a factor required for conviction on the greater offense but not for the lesser, and that a rational view of the evidence would support a verdict that only the lesser offense occurred. Comparing the Michigan

statute to the Federal provision in FRCP 31(c), as construed by the United States Supreme Court in *Sansone v United States*, 380 US 343; 85 S Ct 1004; 13 L Ed 2d 882 (1965), *Cornell* held that an instruction on a lesser offense is only proper "if the charged offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Cornell,* 357.

Defendant acknowledges that there is a body of prior Michigan law that characterizes "statutory" involuntary manslaughter under MCL 750.329 as a "cognate included" offense under a murder charge. See, e.g., *People v Heflin*, 434 Mich 482, 497; 456 NW2d 10 (1990); *People v Maghzal*, 170 Mich App 340, 345; 427 NW2d 552 (1988). In fact, Michigan case law once characterized all forms of manslaughter as "cognate included" offenses under a murder charge. See, for example, *People v Van Wyck*, 402 Mich 266; 262 NW2d 638 (1978); *People v Pouncey*, 437 Mich 382; 471 NW2d 346 (1991). However, all of these cases were decided during a time when this Court ignored the plain meaning of MCL 768.32(1) and introduced the concept of "cognate" lesser included offenses, which served to muddle the relationship between manslaughter and murder. *Mendoza,* 543. Most notably, these cases failed to discuss earlier common-law decisions characterizing manslaughter as a lesser included offense of murder before "cognate" offenses were recognized and none of these cases gave any consideration to the unique relationship between murder and manslaughter. *Mendoza,* 544.

Common–law murder encompasses all killings done with malice aforethought and without justification or excuse. *Mendoza,* 533, quoting *People v Scott,* 6 Mich 287, 292-293 (1859). First degree murder is defined in MCL 750.316, and includes murder

perpetrated by means of poison, lying in wait or any other willful, deliberate and premeditated killing, murder committed in the perpetration or attempted perpetration of fourteen enumerated felonies and murder of a peace or corrections officer during the commission of the peace or correction officer's duties. All other murders are second-degree murder. *Mendoza,* citing MCL 750.317. The elements of second-degree murder are (1) death, (2) caused by the defendant's act, (3) with malice, and (4) without justification. *Mendoza,* quoting *People v Goecke,* 457 Mich 442, 463-464; 579 NW2d 868 (1998).

In Michigan, the penalty for manslaughter is codified, but the definition is left to the common law. *People v Datema,* 448 Mich 585, 593; 533 NW2d 272, 276 (1995), citing *People v Stubenwoll,* 62 Mich 329, 331; 28 NW 883 (1886). See also *People v McMurchy,* 249 Mich 147, 162; 228 NW 723 (1930) ("The law of manslaughter as it exists today has been adopted from the old English common law."); MCL 750.321 ("Any person who shall commit the crime of manslaughter shall be guilty of a felony punishable by imprisonment in the state prison, not more than 15 years or by fine of not more than 7,500 dollars, or both, at the discretion of the court."). Common-law manslaughter is "any homicide which is neither murder nor innocent homicide, and such a killing may be either intentional or unintentional." *Datema, supra,* quoting Perkins & Boyce, Criminal Law (3d ed), p. 83. It is murder without malice:

> Manslaughter is perfectly distinguishable from murder, in this: That though the act that causes the death be unlawful or willful, though attended with fatal results, yet malice, either expressed or implied, which is the very essence of murder, is to be presumed to be wanting in manslaughter. *Mendoza,* 535, quoting *People v Palmer,* 105 Mich 568, 576; 63 NW 656 (1895).

Common-law manslaughter has two broad categories: voluntary and involuntary. *Datema, supra,* citing *People v Townes,* 391 Mich 578, 589; 218 NW2d 136 (1974); *People v Carter,* 387 Mich 397, 418; 197 NW2d 57 (1972). Although these categories have distinct elements and apply in different circumstances, they are often misapplied because "Michigan courts, ours included, have been less than precise in the use of language denoting voluntary or involuntary manslaughter." *Datema, supra,* quoting *People v Beach,* 429 Mich 450, 477, n 13; 418 NW2d 861 (1988).

Voluntary manslaughter is defined in the common law as an intentional killing committed under the influence of passion or "hot blood," produced by adequate or reasonable provocation and before a reasonable time has elapsed for the blood to cool and reason to return. *Mendoza,* quoting *Maher v People,* 10 Mich 212, 219 (1862). See also *Pouncey, supra,* 389 ("...to show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions."). Provocation is what negates malice, the element which distinguishes murder from manslaughter. *Mendoza,* citing *Scott,* 295.

At common law, involuntary manslaughter was a catch-all concept covering "[e]very unintentional killing of a human being...if it is neither murder, nor voluntary manslaughter nor within the scope of some recognized justification or excuse." *Datema, supra,* quoting Perkins & Boyce, *supra.* Michigan case law has defined it as:

> the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty. *Datema, supra,* quoting *People v Ryczek,* 224 Mich 106, 110; 194 NW 609 (1923).

In addition, the Legislature has determined that manslaughter exists when a homicide is committed without malice by means of an intentionally aimed firearm. MCL 750,329; see also *Mendoza,* 536, n 7. Although the prosecution and amicus for the prosecution would have this Court believe that this offense is of recent vintage, it has been part of this state's jurisprudence since 1869. MCL 750.329 was originally enacted in 1869 and with the enactment of the Michigan Penal Code in 1931, the section of the original act corresponding to the present-day MCL 750.329 was revised and placed under the homicide chapter. *Doss, supra,* 97 n2. In promulgating the statute, the Legislature intended to punish the intentional pointing of a firearm resulting in death, even though the defendant did not act with the criminal intent sufficient for a conviction under "common-law" manslaughter. *Heflin, supra,* 504, citing *Maghzal,* 345 and *People v Duggan,* 115 Mich App 269, 272; 320 NW2d 241 (1982). As such, it would be subsumed in the "catch-all" concept of involuntary manslaughter within the theory of a killing done without malice and unintentionally while doing some unlawful act not amounting to a felony. Logically, if "statutory" involuntary manslaughter under MCL 750.329 is a necessarily lesser offense of common-law involuntary manslaughter as defined by Michigan case law, which itself has been held to be a necessarily lesser offense of murder under *Mendoza* because "the elements of voluntary and involuntary manslaughter are included in the elements of murder," *Id.,* 541, then it follows that "statutory" manslaughter under MCL 750.329 is a necessarily lesser offense of murder.

Holding that "statutory" involuntary manslaughter under MCL 750.329 is a necessarily lesser included offense under murder on this basis would be consistent with the Michigan courts' historical understanding of the law of murder. Our courts have

historically concluded that a manslaughter instruction is appropriate on a murder charge if a manslaughter instruction is supported by a rational view of the evidence. *Mendoza,* 542, citing *Hanna,* 321. See also *People v Treichel,* 229 Mich 303, 307-308; 200 NW 950 (1924):

> This Court has repeatedly held, where the charge as laid includes murder in the first degree, and the proofs establish such degree, and no lesser degree, it is not error for the court to instruct the jury that, in order to convict, murder in the first degree must be found. But this court has not held, under a charge here laid, the court *must* instruct the jury to find murder in the first degree or acquit. Whether such an instruction may be given or not depends upon the evidence.
>
> [In this case, the] information charged murder in the first and second degrees, and this was inclusive of manslaughter. The evidence left open for the jury to find defendants guilty of manslaughter. *Mendoza,* 542, citing *Treichel* (emphasis in original).

People v Droste, 160 Mich 66, 78-79; 125 NW 87 (1910) concluded that the trial court was "clearly warranted" in instructing the jury on manslaughter in a murder case because the jury could have concluded there was sufficient intoxication or passion to 'rob [defendant's] act of the necessary elements of murder," while *People v Andrus,* 331 Mich 535, 547-547; 50 NW2d 310 (1951) remarked that it was proper for the court to submit the lesser included offenses of second-degree murder and manslaughter because the evidence was sufficient to support the offense. *Mendoza,* 542-543. Such a holding would not mean that an instruction of "statutory" involuntary manslaughter under MCL 750.329 will be given in every murder case, because it would be warranted only if there was a dispute over whether the defendant acted out of malice, and a rational view of the evidence would support the charge. Indeed, *Mendoza* found that while all forms of manslaughter were necessarily included and "inferior" offenses of

murder, it went on to hold that a manslaughter instruction was not warranted because a rational view of the evidence did not support it. *Id.*, 544-547.

This Court should rule that "statutory" involuntary manslaughter under MCL 750.329, even though previously termed a "cognate" included offense to a murder charge, can still be instructed upon, where otherwise appropriate, under *Mendoza*. It is a "degree[] of that offense [murder] inferior to that charged in the indictment," because it is subsumed into common-law involuntary manslaughter, itself a "inferior" offense of murder, such that a party is entitled to an instruction on that lesser offense when the trial concerns a charge of murder, if there is a dispute over whether the act was committed with malice and the evidence would support a jury verdict that only the lesser and not the charged offense was committed. Although the prosecution and amicus for the prosecution seem to be most concerned with blocking defendant's use of the instruction in this particular case and preserving his conviction, this court must look beyond that. A ruling that "statutory" involuntary manslaughter under MCL 750.329 is a necessarily lesser included offense of murder protects the ultimate truth finding function of a trial by allowing the both the prosecution and the defense to request the instruction in cases similar to this, where a gun is pointed at someone as a joke and the trigger is pulled either accidentally or with the belief that the gun is unloaded and someone is killed.

B. A RATIONAL VIEW OF THE EVIDENCE IN THIS CASE SUPPORTED A CONVICTION OF "STATUTORY" MANSLAUGHTER.

In this case, a rational view of the evidence supported defendant's request for an instruction on "statutory" involuntary manslaughter under MCL 750.329. The medical examiner testified that Moomaw died of a gunshot wound and her death resulted from the discharge of a firearm. Crawford testified that immediately before she heard the gun go off, defendant had the gun pointed directly at Moomaw's head, showing an intent to point a firearm at her. The prosecution cannot say now that defendant did not intentionally aim the gun at Moomaw after it introduced evidence of other gun incidents involving defendant to show his "intent" and that the incident was not an accident. Further, the prosecution's own witnesses admitted that defendant never intended to pull the trigger when he had done similar things in the past. Crawford acknowledged telling police that this was not the first time Moomaw had told her that defendant pointed a gun at her and that she honestly did not think defendant would hurt Moomaw. She also told jurors that defendant was careless about the gun. Through instant messaging, she told Michelle Gomez that defendant did not do it on purpose and that it sounded like he was joking. Lauria testified that on a couple of occasions in the past, defendant had pulled out his gun, looked at her and said "say I won't," but she did not see the action as threatening, and in fact, she took it as a joke because "he wouldn't do anything like that." Defendant caused Moomaw's death without lawful excuse or justification, because there was no evidence that he acted in self-defense, and, as the prosecution maintained throughout the trial, there were no other circumstances excusing his actions.

C. THE OAKLAND CIRCUIT COURT'S FAILURE TO INSTRUCT THE JURY ON "STATUTORY" INVOLUNTARY MANSLAUGHTER WAS NOT HARMLESS ERROR.

In this case, defendant admitted causing the fatality, but disputed the intent element. Preventing defendant from getting a jury instruction on manslaughter under MCL 750.329 where a rational jury could find that only the lesser offense was committed prevented him from submitting his defense theory to the jury and getting a verdict consistent with his admission of a lesser degree of culpability. US Const, Ams V, XIV; *Hopper v Evans,* 456 US 605; 102 S Ct 2049; 72 L Ed 2d 367 (1982); *Beck v Alabama*, 447 US 625; 100 S Ct 2382; 65 L Ed 2d 392 (1980); *Bennett v Scroggy*, 793 F2d 772 (CA 6, 1986); *Ferrazza v Mintzes*, 735 F2d 967 (CA 6, 1984). A jury is unlikely to acquit a defendant who admits a lesser degree of criminal behavior where no option is given to the jury to convict consistent with the defense admission. See *Silver, supra*, 393 n7.

Further, the error was not harmless merely because the jury rejected the claim of involuntary manslaughter under MCL 750.321. Even though failure to give a requested lesser included offense instruction is harmless error when the jury is instructed to consider other lesser offenses but returns a guilty verdict on the principal charge, *People v Beach,* 429 Mich 450; 418 NW2d 861 (1988), that rule is qualified:

> The existence of an intermediate charge that was rejected by the jury does not, of course, automatically result in an application of the *Ross [People v Ross*, 73 Mich App 588 (1977)] analysis. For it to apply, the intermediate charge rejected by the jury would necessarily have to indicate a lack of likelihood that the jury would have adopted the lesser requested charge." *Beach, supra*, 490-491.

The jury's verdict of guilt of second degree murder rather than involuntary manslaughter under MCL 750.321 does not mean that it would have necessarily rejected "statutory"

involuntary manslaughter under MCL 750.329. If the jury believed that defendant intentionally aimed the gun in Moomaw's direction but accidentally fired it, the instructions that were given gave them choice of acquitting defendant, pursuant to the instruction on accident, or convicting him of an inapposite charge. The jury was entitled to consider the full spectrum of criminal responsibility and may have convicted defendant of involuntary manslaughter on the theory of intentionally aiming a weapon without malice if they believed the theory of accident but did want to "let him off" completely.

SUMMARY AND RELIEF

Defendant-Appellee RANDY R. SMITH respectfully requests that this Honorable Court DENY the prosecution's *Application for Leave to Appeal* and not take other peremptory action, or affirm the Court of Appeals and remand his case to the trial court for a new trial, consistent with the Court of Appeals opinion.

ROBIN M. LERG (P 40297)
Attorney for Defendant-Appellee
3001 W. Big Beaver, Ste. 324
Troy, MI 48084
(248) 649-4777

Date: May 18, 2006